UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA – WHEELING DIVISION

JILL A. COX, individually and as administrator and personal representative of the Estate of Jacob Eli Harvey, deceased,

Plaintiff,

v.

THE TRAVELERS COMPANIES, INC., (a/k/a St. Paul Fire and Marine Insurance Company, Travelers Insurance and/or Travelers), a foreign insurance company doing business in West Virginia, ST. PAUL FIRE AND MARINE INSURANCE COMPANY (a/k/a St. Paul Fire & Marine Insurance Company, Travelers and/or Travelers Insurance), a foreign insurance company doing business in West Virginia, RUMMELS OILFIELD SERVICES (a/k/ Rummel's Oilfield Services, Inc. and/or Keith Rummel d/b/a Rummel's Oilfield Services), a foreign corporation doing business in West Virginia, ELIZABETH E. ADAMS, JOHN DOES(S) #1 and JOHN DOE(S) #2;

Defendant

C.A. No.: 1:10-CV-00003

The Honorable Frederick P. Stamp, Jr.

Electronic Filing

CONSOLIDATED BRIEF IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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COUNTERSTATEMENT OF MATERIAL FACTS

This matter involves an insurance coverage dispute under a St. Paul Fire and Marine Insurance Company ("St. Paul") commercial automobile policy, number VK08303601 (the

"Policy"), issued to Rummel's Oilfield Services, Inc. ("Rummel's"), with an effective date of April 6, 2009 through April 6, 2010. Plaintiff is seeking a declaration that Rummel's policy provides liability insurance coverage to Elizabeth E. Adams' ("Adams") for wrongful death/ negligence claims asserted against her by the plaintiff arising out of a vehicular accident. Adams, who at that time was an employee of Rummel's, was involved in a fatal collision with plaintiff's decedent in Washington County, Pennsylvania, in the early morning hours of September 20, 2009. At the time of the collision, Adams was driving a 2005 Chevrolet Silverado VIN No. 1GCEK19B35E258341 (the "Silverado"). That vehicle had been owned at one time by Rummel's. However, on December 22, 2008, Rummel's sold the vehicle to Adams under a written conditional sales agreement. (*See* Appendix to Cross-Motion for Summary Judgment ("Appx.") Ex. "A").

Pursuant to the conditional sales agreement, Adams agreed to purchase the Silverado from Rummel's for $12,000.00, payable in installments. The payments were made by automatic payroll deductions from Adams pay as a Rummel's employee. Adams was required to carry full insurance coverage on the Silverado.[1] The agreement provides that Rummel's release the title to Adams when payment was made in full. On December 22, 2008, the date of execution of the conditional sales agreement, Adams took sole and exclusive possession of the Silverado. She insured it under a Progressive Northern insurance policy no. 76304324. That Policy provides liability insurance coverage to Adams for claims asserted in this matter with limits of $50,000/$100,000. (*See* Appx. Ex. "A"; Keith G. Rummel's Dep. 12:7-11, July 9, 2010, Appx.

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[1] "IN ORDER FOR RUMMEL'S TO MAKE A PAYMENT AGREEMENT WITH ADAMS, AND ALLOW HER TO DRIVE THE VEHICLE IN THE PROCESS. ADAMS MUST CARRY FULL COVERAGE INSURANCE WITH RUMMEL'S OILFIELD SERVICES, INC. 2271 OIL DRIVE CASPER, AND WYOMING 82604 LISTED AS THE LIEN HOLDER ON THE CERTIFICATE OF INSURANCE." (Appx. Ex. "A").

Ex. "B"; Elizabeth E. Adams Insurance Policy No. 76304324 Declarations Page, Appx. Ex. "C").

Prior to December 23, 2008, the Silverado was a specifically covered vehicle on Rummel's insurance policy. On December 23, 2008, the day following execution of the conditional sales agreement, Rummel's removed the Silverado from its then applicable commercial auto policy, Commercial Automobile Policy No. CA 039 14 37 issued by Star Insurance Company. The Silverado was never again insured under Rummel's commercial automobile policy. (*See* Policy Changes, Policy No. CA 039 14 37, Appx. Ex "D"; Jennifer McKillop Affidavit, Appx. Ex. "E").

From December 22, 2008 to September 20, 2009, the date of the accident, the Silverado remained in Adams' sole and exclusive possession; Adams maintained the Progressive Policy providing insurance coverage on the Silverado; Adams made all of the regular payments due on the purchase price. As of September 20, 2009, Adams had paid $6,500 towards the $12,000 purchase price. (*See* Keith G. Rummel Dep. 11:23-13:16, Appx. Ex. "B"; Elizabeth Adams payments summary, Appx. Ex. "F").

As discussed below, the St. Paul Policy will afford no liability coverage for claims in this matter since Elizabeth Adams was the owner of the Silverado at the time of the accident. Coverage would only exist for Adams under the circumstances, if Rummel's had not sold the vehicle to Adams, and still owned it at the time of the fatality. Ignoring most of the solvent facts, plaintiff asserts in support of her motion for summary judgment that Rummel's owned the vehicle.[2] However, under the undisputed facts of record, and pursuant to applicable law, Adams was the owner of the vehicle at the time of the accident.

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[2]In her Motion for Summary Judgment, Plaintiff has chosen to ignore the following facts: 1) from December 22, 2008 through September 20, 2009, the date of the collision, Adams was in sole and exclusive possession of the

WYOMING LAW APPLIES

Although plaintiff's motion for summary judgment cites law from the applicable jurisdiction, plaintiff fails to go into a discussion as to why Wyoming law applies to this diversity matter. When exercising diversity jurisdiction, a federal district court must apply the choice-of-law rules of the state in which it sits. Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487, 496, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941). In this case, West Virginia choice-of-law rules apply.

In determining what choice-of-law rule to apply, the first step is to characterize the type of issue involved. Liberty Mut. Ins. Co. v. Triangle Indus., Inc., 390 S.E.2d 562, 565 (W.Va. 1990). "[T]he interpretation of insurance policy coverage, rather than liability, is treated as a contract question for purposes of conflicts analysis." Id. The Restatement (Second) Conflict of Laws Section 193, regarding contracts, states:

> The validity of a contract of fire, surety or casualty insurance and the rights created thereby are determined by the local law of the state which the parties understood was to be the principal location of the insured risk during the term of the policy, unless with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the transaction and to the parties, in which event the local law of the other state will be applied.

Id. at 566; Restatement (Second) Conflict of Laws § 193. Section 6 of the Restatement outlines a number of factors for courts to consider in identifying the state with the most significant relationship. These factors are:

> (a) The needs of the interstate and international systems,
> (b) The relevant policies of the forum,
> (c) The relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,

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Silverado; 2) Adams' possession of the Silverado was by conditional sales agreement and not by permission of Rummel's; 3) Rummel's removed the Silverado as a scheduled item from its Commercial Automobile Policy on December 23, 2008; and 4) consistent with the requirement explicitly contained within the conditional sales agreement for the Silverado, Adams did, in fact, insure the Silverado with Progressive.

(d) The protection of justified expectations,
(e) The basic policies underlying the particular field of law,
(f) Certainty, predictability and uniformity of result, and
(g) Ease in the determination and application of the law to be applied.

Id. at 567; Restatement (Second) Conflict of Laws § 6. However, West Virginia has another rule applicable to insurance policies:

> [I]n a case involving the interpretation of an insurance policy, made in one state to be performed in another, the law of the state of the formation of the contract shall govern, unless another state has a more significant relationship to the transaction and the parties, or the law of the other state is contrary to the public policy of this state.

Id. at 567.

Regarding the insurance coverage issues in this case, all relevant factors point unerringly by to an application of Wyoming law. Rummel's is incorporated in Wyoming. The policy was issued by a Wyoming agent to Rummel's in Wyoming. There is no question that Wyoming law applies. Plaintiff tacitly concedes in her summary judgment brief that Wyoming law applies to this matter.

STANDARD

Summary judgment is appropriate under Federal Rule of Civil Procedure 56 when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *See* Givens v. Main Street Bank, 2010 WL 2925942 (N.D. W.Va. 2010). Summary judgment is required when a party fails to make a showing sufficient to establish an essential element of a claim, even if there are genuine factual issues proving other elements of the claim. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

The fundamental issue of this declaratory judgment action is whether Rummel's insurance policy with St. Paul provides coverage for the September 20, 2009 collision.

Essentially, the issue of ownership of the Silverado is dispositive and the material facts establishing ownership are not in dispute.

Insurance policies are contracts. St. Paul Fire and Marine Ins. Co. v. Albany County School Dist. No. 1, 763 P.2d 1255, 1258 (Wyo. 1988); Ricci v. New Hampshire Ins. Co., 721 P.2d 1081, 1085 (Wyo. 1986). As with any contract, interpretation of an unambiguous contract presents an issue of law which may be appropriately decided by the Court on summary judgment. Continental Ins. v. Page Engineering Co., 783 P.2d 641, 651 (Wyo. 1989); Ricci, 721 P.2d at 1085. Examination of an unambiguous contract must be confined to its 'four corners' according to the plain meaning of the language therein. Doctors' Co. v. Ins. Corp. of America, 864 P.2d 1018 (Wyo. 1993); Prudential Preferred Properties v. J and J Ventures, Inc., 859 P.2d 1267, 1271 (Wyo.1993).

Likewise, application of the law to the undisputed facts is the purpose of summary judgment. "Summary judgment is proper when questions of law are raised and there are no material facts at issue." Hill v. Mayall, 886 P.2d 1188, 1190 (Wyo. 1994) *citing* Fugate v. Mayor and City Council of Town of Buffalo, 348 P.2d 76, 81 (Wyo. 1959). Therefore, summary judgment is appropriate for this insurance coverage matter in St. Paul and Travelers' favor as a matter of law.

ARGUMENT

I. THE ST. PAUL INSURANCE POLICY ISSUED TO RUMMEL'S OIL FIELD SERVICES DOES NOT AFFORD COVERAGE FOR EMPLOYEES OPERATING VEHICLES OWNED BY THE EMPLOYEE AT THE TIME OF COLLISION.

As the following discussion demonstrates, there is no coverage under the St. Paul Policy issued to Rummel's for the claims against Adams, because Adams owned the vehicle.

Rummel's St. Paul Commercial Automobile Policy provides, *inter alia*, liability insurance pursuant to a form entitled "**Auto Liability Protection 44449" (Rev. 12-93)**. The insuring agreement contained within the "Auto Liability Protection" form states, in relevant part:

> **What This Agreement Covers**
>
> **Bodily injury and property damage liability.**
> We'll pay amounts any *protected person* is legally required to pay as damages for covered bodily injury or property damage that:
>
> - results from the ownership, maintenance, use, loading or unloading of a covered auto; and
> - is caused by an accident that happens while this agreement is in effect.

The Policy explicitly defines "Protected person" as: "any person or organization who qualifies as a protected person under the Who Is Protected Under This Agreement section." That section provides:

> **Who Is Protected Under This Agreement**:
>
> . . .
>
> **Any permitted user**. Any person or organization to whom you've given permission to use a covered auto you own, rent, lease, hire or borrow is a protected person.
>
> However, we won't consider the following to be a protected person:
>
> . . .
>
> - An employee of yours or a member of an employee's household if the covered auto is owned by that employee or member of that employee's household.
>
> . . .

(Appx. Ex "G"). Accordingly, the Policy provides liability coverage to any "protected person" for the use of any "covered auto." The term "covered auto" is defined broadly in the Policy, including "Any auto," which by its express terminology would include the 2005 Chevrolet Silverado being operated by Adams at the time of the accident.[3]

The section of the Policy entitled "Who Is Protected Under This Agreement" explicitly states that if the policyholder is a corporation, like Rummel's, a "protected person" includes the named insured corporation, its officers and executives, and also includes a permissive user of a vehicle, but only a vehicle that the named insured "own[s], hire[s], rent[s], lease[s], or borrow[s]."(Emphasis added). The term "protected person", as defined above, does not include a permissive user of any other vehicle, for example, a vehicle which is owned by the permissive user.

Accordingly, Adams would be a "protected person" entitled to coverage within the meaning of the Policy in this case only if Rummel's still owned the vehicle at the time of the accident. Conversely, if Adams owned the Silverado at the time of the accident, she is not a "protected person" entitled to coverage under the Policy.

As discussed below, Rummel's did not own the Silverado--Adams did. Thus, the St. Paul Policy does not provide coverage for this accident, summary judgment to that effect is appropriate as a matter of law.

II. ADAMS OWNED THE SILVERADO AT THE TIME OF THE COLLISION

Rummel's sold the vehicle to Adams long before September 20, 2009. Thus, Rummel's did not own the Silverado at the time of the accident; Adams did. Thus, there is no liability coverage for Adams under the Policy.

The Policy does not contain an express definition of the term "owner." In the absence of an express definition, a court must utilize the common and ordinary meaning of a term. *See*,

[3] **Any Auto** means any owned, rented, leased or borrowed auto. It includes hired, nonowned, newly acquired, replacement and temporary substitute autos. It clearly does not include a vehicle owned by an employee of the policyholder.

McKay v. Equit. Life Assur. Soc. of the United States, 421 P.2d 166, 168 (Wyo.1966) (*holding that the words used will be given their common and ordinary meaning and that the language shall not be 'tortured' in order to create an ambiguity*); State ex rel. Farmers Ins. Exch. v. District Court of Ninth Jud. Dist., 844 P.2d 1099, 1101 (Wyo.1993); Aaron v. State Farm Mut. Auto. Ins. Co., 34 P.3d 929, 933 (Wyo. 2001). In applying such an approach, typical sources of common and ordinary meanings are relevant statutory provisions and definitions; the motor vehicle code in this instance. Additionally, the majority of jurisdictions that have been faced with the issue of ownership of a motor vehicle subject to a conditional sales agreement for liability insurance purposes look to the intention of the parties to the agreement. Finally, some jurisdictions adhere to the view that the uniform commercial code prevails to establish ownership of a vehicle subject to a sales agreement.

A.
Adams was the owner of the Silverado pursuant to the Wyoming Vehicle Code, W.S. 31-1-101

Perhaps the most logical, apposite and analytically sound source of a common meaning of the term "owner" for liability insurance coverage purposes is the definition utilized by the Wyoming legislature for purposes of the compulsory insurance provisions of the Wyoming Motor Vehicle Safety-Responsibility Act ("MVSRA"). *See* W.S. 31-4-103(a), W.S. 31-9-102, *et seq*. The compulsory insurance provisions are most directly relevant to the instant dispute, as they control requirements for motor vehicle liability insurance and, most poignantly, establish the statutory obligation to provide mandatory minimum limits of liability insurance on motor vehicles. As one would expect, these statutory provisions mandate that the "owner" provide insurance and, hence, necessarily provide a statutory definition to establish who is deemed to be the "owner" of a motor vehicle for insurance coverage purposes. Accordingly, given that this insurance issue is controlled by Wyoming law, the relevant statutory definition of "owner" utilized by the Wyoming MVSRA is the logical source of definitional language, and must define by whom the Silverado is "owned" within the meaning of the Policy.[4]

The compulsory insurance provision states:

> No **owner** of a motor vehicle currently required to be registered or which is required to be registered within a period of time, shall operate or permit the operation of his motor vehicle without having in full force and effect a motor vehicle liability policy in amounts provided by W.S. 31-9-405(b) or a bond in amounts provided by W.S. 31-9-102(a)(xi). …

W.S. 31-4-103(a) (emphasis added).[5] For the definition of the term "**owner,**" the statute in W.S. 31-9-102(a), references a definition of the term "**owner**" contained in W.S. 31-5-102(a), subparagraph (xxvi) as follows:

> "A person who holds the legal title of a vehicle **or if a vehicle is the subject of an agreement for the conditional sale or lease thereof with the right of purchase upon performance of the conditions stated in the agreement and with an immediate right of possession vested in the conditional vendee or lessee[…] then the conditional vendee or lessee or mortgagor shall be deemed the owner for the purpose of this act.**"

W.S. 31-5-102(a)(xxvi) (emphasis added). Thus, the statute explicitly provides that in circumstances exactly like this, where the vehicle was titled to a seller, Rummel's, then is sold to a buyer, Adams, under a conditional sales agreement, the buyer, Adams "shall be deemed the owner" (emphasis supplied).

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[4] One of the purposes of the Motor Vehicle Safety Responsibility Act is to protect the motoring public, *inter alia,* by requiring financial security for the benefit and protection of persons injured in motor vehicles, from those who have accidents, in part by requiring the "owner" of a vehicle to maintain limits of insurance liability coverage. This purpose was achieved in the instant matter, as Elizabeth Adams had motor vehicle liability insurance coverage on the Silverado in an amount far in excess of the minimum requirements pursuant to Wyoming law. *See* W.S. § 31-9-405(b)(2); (Appx. Ex. "C").

[5] W.S. 31-9-405(b) mandates the limits and requirements for an **owner's** policy of liability insurance. W.S. 31-9-102(a)(xi) defines "proof of financial responsibility".

Plaintiff's reliance upon Chapter 2 of the Motor Vehicle Code, W.S. 31-2-101, et seq., regarding Title and Registration of motor vehicles, is misplaced. Plaintiff cites W.S. 31-2-201, which provides:

> Except as provided by W.S. 31-2-102 and subsection (b) of this section, every owner of a vehicle which will be operated on Wyoming highways and for which no Wyoming certificate of title has been issued to the owner, or the transferee upon transfer of ownership of a vehicle for which a Wyoming certificate of title is required, shall apply for a certificate of title at the office of the county clerk.

W.S. 31-2-201(a). Plaintiff also relies on another section of the Title and Registration section of the Wyoming Motor Vehicle Code which states, "[a] certificate of title is prima facie proof of ownership of the vehicle for which the certificate was issued." W.S. 31-2-103(d). In a separate argument, plaintiff cites W.S. 31-2-104(a), which provides:

> Except as otherwise provided in this section, the owner of a vehicle who sells or transfers his interest in a vehicle for which a certificate of title has been issued shall endorse an assignment and warranty of title upon the certificate for the vehicle with a statement of all liens and encumbrances thereon, which assignment, warranty and statement shall be subscribed by the owner before a notarial officer and acknowledged thereby in the manner provided by law, to be dated and delivered to the transferee at the time of delivering the vehicle. Except as provided in subsection (b) of this section, the transferee shall present the certificate to a county clerk and apply for a new certificate of title within the same time periods as required by W.S. 31-2-201(a)(ii).

The Title and Registration chapter of the Wyoming Motor Vehicle Code is administrative in nature.[6] Most importantly, the statute has nothing to do with insurance. It regulates the procedural, administrative aspects of title-holding for motor vehicles, including filing, transfer, issuance, etc. of certificates of title. Although the provisions of the Title and Registration statute expressly create a *prima facie* case ownership, *see* W.S. 31-2-103(d), this *prima facie* case is, without doubt, defeated by feature of the statute and must be read in conjunction with the

[6] *See* Smith v. Allstate Ins. Co., 467 F.2d 104 (5th Cir. (Tex.) 1972).

definition of "owner" referenced in the above quoted provisions of the MVSRA. And, at least as to ownership for purposes of liability insurance coverage, to MVRSA definition must govern. The Title and Registration chapter and the MVSRA govern very different motor vehicle situations, and the MVSRA, mandating minimum limits of liability insurance for the 'owner' of a vehicle, is controlling for liability insurance purposes.

Although the Wyoming Supreme Court has not had occasion to address the purpose underlying the Title and Registration chapter of the Motor Vehicle Code,[7] other jurisdictions which have addressed the purpose of similar statutes have concluded that they are administrative, directory, and aimed at preventing theft and trafficking of motor vehicles, as follows:

- Motor Vehicle Certificate of Title Act is a recording statute whose purpose is to perfect and give notice of security interests; it does not affect the creation of a property or security interest, which remains a matter of contract between the parties. Smith v. Hardeman, 636 S.E.2d 106 (Ga. App. 2006) (*citing* Ga. Code. §§ 40-3-1, et seq.).

- Purpose of Certificate of Motor Vehicle Title Act is to prevent importation of stolen motor vehicles and thefts and frauds in the transfer of title to motor vehicles. Allan Nott Ents, Inc. v. Nicholas Starr Auto, LLC, 851 N.E.2d 479 (Ohio 2006) (*citing* R.C. §§ 4505.01, et seq.).

- Purpose of the Texas Certificate of Title Act is not to prevent sales and transfers of interests in motor vehicles. Vibbert v. PAR, Inc., 224 S.W.3d 317 (Tex. App. 2006) (*citing* V.T.C.A., Transportation Code §§ 501.001, et seq.); Hudson Buick, Pontiac, GMC Truck Co. v. Gooch, 7 S.W.3d 191 (Tex. App. 1999).

- The purpose of the title act, providing that the transfer of a vehicle is not effective unless, at the time of the delivery of the vehicle, the owner executes an assignment and warranty of title to the transferee, was to prevent motor vehicle thefts, and not to make automobile purchasers wary. Jones v. Mitchell, 816 So.2d 68 (Ala. Civ. App. 2001) (*citing* Ala. Code. § 32-8-44).

[7] *See* Park County Implement Co. v. Craig, 397 P.2d 800 (1964) (declining to discuss merit of defendants' contention concerning the pertinency of various provisions of the motor vehicle law requiring certificates of title to be issued under certain circumstances).

- Purpose of Kentucky statute governing transfer of certificate of title following sale of automobile by licensed motor vehicle dealer, and allowing either buyer or dealer to apply for registration and certificate of title, is to promote the efficient and smooth transfer of titles of motor vehicles bought and sold throughout the state. Kelly v. McFarland, 243 F.Supp.2d 715 (E.D. Ky. 2001) (*citing* KRS 186A.220(5)).

- Statutory requirement that motor vehicles be titled serves the purpose of protecting the owners of motor vehicles, persons holding liens thereon, and the public in transactions involving vehicles. Flynn v. Indiana Bureau of Motor Vehicles, 716 N.E.2d 988 (Ind. App. 1999) (*citing* A.I.C. 9-17-2-1).

Certainly, contrary to plaintiff's implicit argument, the objective of Wyoming's Title and Registration law is not to specify who is the owner of a vehicle for liability insurance purposes.

An exhaustive search reveals that there is no Wyoming case on point. However, at least one other court had occasion to determine the proper statutory definitional source of the term "owner" for liability insurance coverage purposes. In Cowles v. Rogers, the Court of Appeals of Kentucky had occasion to apply the definition of "owner" from the motor vehicle statute to a conditional sales agreement. 762 S.W.2d 414 (Ky. App. 1989). Therein, the purchaser of a vehicle, uninsured, collided with a car driven by the plaintiff. After receiving a judgment in his favor, the plaintiff attempted to execute that judgment against the seller's insurance carrier. Based upon a nearly identical statutory framework,[8] the Court of Appeals held the purchaser to be the vehicle's owner for liability insurance purposes and foreclosed recovery by the plaintiff

[8] "If a vehicle is the subject of an agreement for the conditional sale or lease, with the vendee or lessee entitled to possession of the vehicle, upon performance of the contract terms, for a period of three hundred sixty-five (365) days or more and with the right of purchase upon performance of the conditions stated in the agreement and with an immediate right of possession vested in the conditional vendee or lessee, or if a mortgagor of a vehicle is entitled to possession, the conditional vendee or lessee or mortgagor shall be deemed the owner." KRS 186.010(7). The Kentucky Motor Vehicle Code also contains a provision which states: "If an owner transfers his interest in a vehicle, he shall, at the time of the delivery of the vehicle, execute an assignment and warranty of title to the transferee ..." KRS 186A.215(1). Note that the conditional sales agreement exception controls over the transfer/warranty of title provision for insurance purposes when a conditional sales agreement is in effect.

under the seller's insurance policy. Thus the seller of the vehicle, Rummel's, was not the "owner" of the vehicle; the purchaser, Adams, was.

If this Court accepts the reasoning of the Kentucky court in Cowles, there is no logical and reasoned conclusion other than that Adams was the owner of the Silverado at the time of the accident. Adams entered into the Bill of Sale/Contract for Lien, a conditional sales agreement, with Rummel's for the purchase of the Silverado on December 22, 2008, pursuant to which she had an immediate right to possession and would receive title upon payment in full of the purchase price. Further, Adams immediately insured and maintained motor vehicle liability insurance coverage on the Silverado with a policy limit far in excess of the mandatory minimum liability insurance limits pursuant to Wyoming law. Therefore, employing the statutory paradigm to determine who "owned" the Silverado at the time of the accident would be dispositive. Under the Wyoming compulsory insurance provision, W.S. 31-4-103(a), and MVSRA, W.S. 31-9-102, *et seq.*, from and after December 22, 2008, and clearly as of the date of the fatality, Adams, not Rummel's, was the "owner" of the vehicle.

B.
The parties to the conditional sales agreement, Rummel's and Adams, intended that Adams was the owner of the Silverado.

Although Wyoming's MVSRA unwaveringly leads to the conclusion that Adams was the "owner" of the Silverado for liability insurance purposes, the same conclusion is reached by looking to the intention of the parties, Rummel's and Adams. Intention of the parties to a conditional sale agreement regarding "ownership" for liability insurance purposes controls the analysis of this issue in several jurisdictions. *See* United Fire & Cas. Co. v. Perez, 419 P.2d 663 (Colo. 1966); Travelers Ins. Co. v. Lawson, 281 S.E.2d 116 (S.C. 1981); Bacheller v. Employers Mut. Liab. Ins. Co., 290 N.W.2d 872 (Wis. 1980); Smith v. Allstate Ins. Co, 467 F.2d 104 (5th

Cir. (Tex.) 1972); Pugh v. Hartford Ins. Group, 328 N.Y.S.2d 872 (N.Y. 1972); Wallace v. Employers Cas. Co., 418 F.2d 1323 (9th Cir. (Ariz.) 1969); Hayes v. Hartford Accident & Indem. Co., 417 S.W.2d 804 (Tenn. 1967).

In fact, in United Fire and Casualty Company v. Perez, *supra.*, the Supreme Court of Colorado analyzed a situation, nearly indistinguishable from the current situation, in which a purchaser took delivery of a vehicle without the certificate of title, secured his own car insurance, and began making payments on the purchase price. When the purchaser was involved in a collision, the plaintiff secured judgment against the purchaser and attempted execution against the purchaser's insurer and the seller's insurer. The Supreme Court of Delaware refused a holding that there was any insurance coverage under the seller's policy for the purchaser, affirming the trial court's order which stated, in part:

> … the intention was clear between the two parties, and uncontradicted, that Edmonds intended to sell and Reese intended to buy this automobile, and that that purchase was consummated by delivery, and that thereafter Edmonds exercised no dominium whatsoever over the automobile, nor did he make any attempt to exercise any control whatever over the car.

Id. 419 P.2d at 665.[9]

In the current situation, the parties to the agreement, Rummel's and Adams, both intended that Adams was the "owner" of the Silverado. As of the date of the conditional sales agreement, Adams took exclusive possession, exercised all dominion and control, made regular payments towards the purchase price, and insured the vehicle under a personal automobile insurance policy providing liability insurance coverage from the date she purchased it. Likewise,

[9] The Supreme Court of Colorado also refused to apply a provision of the Colorado Statute analogous to W.S. 31-2-104(a), stating: "[t]his Act has been construed to make financial transactions involving automobiles more secure and certain. It will be noted that other or different types of transactions are not made void particularly with reference to the parties to the transaction." Id. at 666.

Rummel's delivered the Silverado to Adams, relinquished all dominion and control, accepted payments, and removed the Silverado from its insurance policy.

Without doubt, at the time of the collision, Rummel's no longer owned the Silverado. Adams was the owner.[10]

C.
Pursuant to the Uniform Commercial Code, W.S. 31.4-2-401, Rummel's was not the owner of the Silverado; Adams was.

If the Court is not yet persuaded regarding the ownership of the Silverado, the Uniform Commercial Code also mandates a finding that Adams was the "owner" of the Silverado.[11] Specifically:

> Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place …

W.S. 31.4-2-401; *see also* Park County Implement Co. v. Craig, 397 P.2d 800, 801 (Wyo. 1964) (the Uniform Commercial Code "has been held as applicable to motor vehicles").

The plain language of the passage of title provision, above, of the Uniform Commercial Code mandates a finding that ownership of the Silverado transferred from Rummel's to Adams on December 22, 2008, the date of delivery of the Silverado.

III. THE BILL OF SALE/CONTRACT FOR LIEN IS A VALID AND ENFORCEABLE CONTRACT.

Adams was paying for the Silverado by virtue of deductions from her pay from Rummel's. Under the terms of the conditional sales agreement, if Adams' employment terminated before the last payment was deducted, Rummel's had the right to reclaim ownership of the vehicle. Plaintiff argues that the possibility of a reversion of ownership is sufficient to conclude that ownership did not pass to Adams at all. That argument fails for so many reasons it is difficult to know where to begin. First, the argument itself is "illusory," and utterly unfounded speculation. Adams did not default, and Rummel's did not reclaim ownership. Second, this feature of the conditional sales agreement is typical, and it is the feature that gives the conditional sales transactions the character of an alternative form of security for the payment by the buyer of the purchase price. It certainly has no bearing on the passage of ownership to the buyer.

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[10] Rummel's deposition has been taken. He testified that he "sold" the Silverado to Adams, and when Adams' deposition is taken, it is inevitable that she will testify the same way.

[11] *See* Pugh v. Hartford Ins. Group, *supra* (applying the UCC and intention of the parties to determine ownership for liability insurance purposes); Scott v. Continental Ins. Co., 259 So.2d 391 (La. 1972) (applying provisions of the civil code).

Plaintiff submits, inter alia, that because Adams was an employee at will, the conditional sales agreement was an illusory contract. An illusory contract is one which the parties do not make promises to one another. *See* Jackson Hole Builders v. Piros, 654 P.2d 120 (Wyo. 1982). Even if a contract may be construed so as to result in a failure of consideration and as illusory, the courts will interpret "such legal detriment as will satisfy the requirement of sufficient consideration." Id. at 123.

> Our basic purpose in construing or interpreting a contract is to determine the intention and understanding of the parties. If a contract is in writing and the language is clear and unambiguous, the intention is to be secured from the words of the contract. And the contract as a whole should be considered, with each part being read in light of all other parts. The interpretation and construction is done by the court as a matter of law.

Id. (citations omitted).

In the instant matter, as discussed above, pursuant to the conditional sales agreement, Rummel's agreed to sell and Adams agreed to buy the Silverado. The parties agreed upon a purchase price of $12,000 and Adams made payments in the amount of $6,500 on said purchase price from the date of the agreement to the date of the accident. Adams also agreed to fully insure the Silverado, which she did with Progressive. Rummel's agreed to title the vehicle to

Adams upon receipt of the full purchase price. This contract was not rendered illusionary merely because it contains a remedy for default, in which Rummel's would retain any payments made and repossess the Silverado if Adams lost her employment and was unable to pay. A court would enforce the conditional sales agreement, as written, pursuant to this intention.

Thus, the conditional sales agreement was fully enforceable against both parties in a court of law.

CONCLUSION

In looking to the provisions and definitions of Wyoming's Motor Vehicle Code Rummel's was not the owner of the Silverado on January 20, 2009. Adams was clearly the owner of the Silverado as of December 22, 2008. The evidence plainly shows that Adams and Rummel's entered into the conditional sales agreement for the Silverado and on that date, Adams had the immediate right of possession, which was vested when she took sole and exclusive possession of the vehicle. According to the plain language of Wyoming's statutory definition, Adams was the "owner" of the vehicle, and therefore, is not a "protected person" under the Policy.

Finally, the intent of the parties and whether or not those parties mutually consented to a transaction wherein ownership was to be transferred, should dictate who owned the Silverado following December 22, 2008. The intent of the parties in the instant matter is clear: Adams immediately began making consistent payments toward the full purchase price, immediately took possession of the Silverado, exclusively used, operated and maintained it from that day forward, and insured it under a personal automobile liability policy. Both Adams and Rummel's, by way of their agreement and their corresponding behaviors and actions, agreed that ownership was transferred as of the date of the transaction in December of 2008.

Because Adams "owned" the vehicle in September of 2009, she does not fall within the meaning of the term "protected person" under the St. Paul Commercial Automobile Policy and is not entitled to coverage under the Policy. Accordingly, summary judgment in favor of Travelers and St. Paul should be granted, and plaintiff's cause of action for declaratory relief against them dismissed.

Respectfully Submitted By:

By: ______________________________

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Company

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA – WHEELING DIVISION

JILL A. COX, individually and as administrator and personal representative of the Estate of Jacob Eli Harvey, deceased,

Plaintiff,

v.

THE TRAVELERS COMPANIES, INC., (a/k/a St. Paul Fire and Marine Insurance Company, Travelers Insurance and/or Travelers), a foreign insurance company doing business in West Virginia, ST. PAUL FIRE AND MARINE INSURANCE COMPANY (a/k/a St. Paul Fire & Marine Insurance Company, Travelers and/or Travelers Insurance), a foreign insurance company doing business in West Virginia, RUMMELS OILFIELD SERVICES (a/k/ Rummel's Oilfield Services, Inc. and/or Keith Rummel d/b/a Rummel's Oilfield Services), a foreign corporation doing business in West Virginia, ELIZABETH E. ADAMS, JOHN DOES(S) #1 and JOHN DOE(S) #2;

Defendant

C.A. No.: 1:10-CV-00003

The Honorable Frederick P. Stamp, Jr.

Electronic Filing

CERTIFICATE OF SERVICE

I hereby certify that on September 14, 2010, I electronically filed the foregoing CONSOLIDATED BRIEF IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following CM/ECF participants:

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